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No. 90-1108

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

KAISER DEVELOPMENT COMPANY, aka KACOR DEVELOPMENT CORPORATION, and KAISER HAWAII KAI DEVELOPMENT COMPANY,
Petitioners,

v.

CITY AND COUNTY OF HONOLULU,
A Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the courts below err in concluding that Petitioners do not have a property interest in Queen's Beach that is protected under the Fifth Amendment to the United States Constitution?

2. Did the courts below err in concluding that certain of Petitioners' claims are not ripe for federal adjudication?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

By complaint dated August 24, 1984, Petitioners Kaiser Development Company, KACOR Development Corporation, and Kaiser Hawaii Kai Development Company (collectively "Kaiser") initiated this action against Respondent City and County of Honolulu ("the City"). Read liberally, Kaiser's complaint sought relief pursuant to 42 U.S.C. § 1983 based on allegations that the City's land use regulations and other conduct violated Kaiser's rights involving a certain parcel of land known as "Queen's Beach" under the Fifth and Fourteenth Amendments to and the Contract Clause of the United States Constitution.[1]

Thereafter, the City filed motions for summary judgment pertaining to all claims of Kaiser, in addition to those of Bishop. In its decision on the City's motions, the United States District Court for the District of Hawaii (Honorable Samuel P. King, Judge) held as follows:

> Specifically, I find that Kaiser does not have a property interest in Queen's Beach; that plaintiffs do not have any vested rights to development at Queen's Beach; that plaintiffs' claims are not ripe for review under *Williamson County [Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)]; that none of the regulations or plans at issue violate due process or equal protection on their face; that plaintiffs are not entitled to procedural due process; and that the City has not violated the guaranties of the Contract Clause.

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[1] Richard Lyman, Jr., et al., Trustees of the Bernice P. Bishop Estate ("Bishop"), filed an intervening complaint in this case on July 19, 1985. The claims of Bishop parroted those of Kaiser.

Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. 926, 949 (D. Haw. 1986) (Petitioners' Appendix at 43a).[2] In accordance with its holding, the district court granted summary judgment against Kaiser[3] on all of its claims.[4]

Kaiser appealed to the Court of Appeals for the Ninth Circuit from the district court's decision granting summary judgment against it on its Fifth Amendment taking claim and its Fourteenth Amendment substantive due process claim.[5] Specifically, Kaiser appealed from the findings that it does not have a protected property interest in Queen's Beach and that its claims are not ripe for federal court review. The court of appeals affirmed for the reasons stated in the district court's decision. *Kaiser Dev. Co. v. City and County of*

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[2] "Appendix" references throughout this brief are to the decisions below as set forth in Petitioners' appendix.

[3] However, relying on *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146-47 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983), the district court held that Bishop's "inequitable precondemnation activities" claim was not subject to the Supreme Court's "finality" requirements, *see, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and denied summary judgment *only as to that claim*. Contrary to Kaiser's statement that "[t]he court also summarily dismissed all of Bishop's claims except those for unconstitutional exactions and inequitable precondemnation activities," *see* Kaiser's Petition, p. 3 n.3, the court's finding did not, and still does not, support the statement that a claim of unconstitutional exaction was involved at the trial level:

> In conclusion, the City's motions for summary judgment are granted against Bishop and Kaiser on all causes of action except for Bishop's claims concerning *inequitable precondemnation activities*.

649 F. Supp. at 949 (Appendix 43a) (emphasis added).

[4] As Kaiser correctly points out, *see* Kaiser's Petition, p. 3 n.3, because summary judgment was granted against it on all of its claims it did not participate in the trial, which resulted in a directed verdict for the City. (Appendix 48a-53a).

[5] At that point, Kaiser abandoned any Fourteenth Amendment procedural due process or equal protection claims in addition to any claim pursuant to the Contract Clause.

Honolulu, 898 F.2d 112, 113 (9th Cir. 1990) (Appendix 46a).[6] In reaching its decision, the court of appeals reviewed relevant cases decided subsequent to the district court's decision and concluded that none of those cases changed the validity of the district court's reasoning. *Id.* (Appendix 46a-47a).[7]

Following the decision by the court of appeals, Kaiser filed a petition for reconsideration and suggestion for rehearing *en banc*. Therein, Kaiser challenged the court's conclusion that certain of Kaiser's claims are not ripe for federal adjudication.[8] Kaiser's petition for reconsideration was denied, and Kaiser's suggestion for rehearing *en banc* was rejected. *Kaiser Dev. Co. v. City and County of Honolulu*, 913 F.2d 573, 574 (9th Cir. 1990) *(per curiam)* (Appendix 65a-66a).

Bishop has now petitioned this Court for a writ of certiorari.[9]

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[6] Kaiser's assertions that it is "left guessing as to the Ninth Circuit's rationale" and that the decision by the court of appeals is "devoid of analysis" are groundless. *See* Kaiser's Petition, p. 2 n.2. In holding that "[t]he decision of the district court is affirmed for the reasons stated by Judge King in *Kaiser Development Co. v. Honolulu*, 649 F. Supp. 926 (D. Haw. 1986)," 898 F.2d at 113 (Appendix 46a), the court of appeals adopted the rationale and the thorough analysis set forth in the district court's lengthy decision. *See* Appendix 1a-44a.

[7] Kaiser criticizes the court of appeals for overlooking "key" cases. *See* Kaiser's Petition, p. 2 n.2. The cases to which Kaiser makes reference, *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), and *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), were discussed at length in the district court's decision granting summary judgment against Kaiser on all of its claims, a decision the court of appeals affirmed. Hence, those cases were not overlooked, but addressed by reference. The decision by the court of appeals makes it perfectly clear that the cases listed therein are cases "decided since the date of [the district court's] decision." 898 F.2d at 113 (Appendix 46a). Further, if Kaiser truly believed that the court of appeals overlooked key cases, Kaiser surely would have brought those cases to the court's attention in its petition for reconsideration. However, Kaiser's petition failed to cite those cases.

[8] Kaiser did not petition the court of appeals to reconsider or to rehear *en banc* the property interest issue.

[9] Kaiser has now abandoned any Fourteenth Amendment substantive due process claim.

STATEMENT OF FACTS[10]

A. The Subject Property: Queen's Beach

Bishop owns approximately 6,000 acres of land, now known as "Hawaii Kai," on the island of Oahu, State of Hawaii.[11] The subject property is a 209.4 acre parcel in Hawaii Kai known as "Queen's Beach." Queen's Beach is vacant, undeveloped land.

B. Kaiser's Interest

On April 27, 1961, Bishop and Kaiser entered into an agreement (the "Development Agreement"),[12] which is the sole source of Kaiser's claimed property interest in Queen's

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[10] Kaiser contends that "[a]ll the *facts* [in its petition] must be viewed in the light most favorable to Kaiser since this petition seeks review of a motion for summary judgment." *See* Kaiser's Petition, p. 4 n.4 (emphasis added). The City agrees with Kaiser's contention to the extent that "facts" recited in Kaiser's petition were "facts" before the district court, which is not always the case, and to the extent that "facts" recited in Kaiser's petition, if presented below, are accurately represented in the petition, which is rarely the case.

[11] As Kaiser points out, *see* Kaiser's Petition, p. 5 n.9, the question of the taking of property in Hawaii Kai has been before this Court previously. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The similarity ends there, however. In *Kaiser Aetna*, the Court found a taking through physical invasion of a privately owned marina. *Id.* at 180. No claim of physical invasion is being made in this case.

[12] Despite countless references to the operative contract between Kaiser and Bishop, in briefs, motions, arguments, exhibits, testimony, court decisions and, indeed, Kaiser's own internal documents, as the "Development Agreement," Kaiser now refers to it as the "assignment." One would hope that Kaiser is not under the impression that a shift in labelling will add what it would like to the substance and meaning of the agreement as interpreted by the trial court and affirmed by the court of appeals. Semantic legerdemain, a practice of those in the uncomfortable position of trying to make something out of nothing, does not add substance to claims otherwise meritless. *See infra* Section I.

Beach.[13] The Development Agreement designates Kaiser as Bishop's "independent contractor to subdivide, develop and improve" Hawaii Kai.[14] The Development Agreement also provides that Kaiser is obligated to obtain necessary governmental approvals in order to proceed with development of any parcel in Hawaii Kai.

The nature and extent of Kaiser's interest in Queen's Beach is well-defined in the Development Agreement: Kaiser has no interest in the title to Queen's Beach; Kaiser has no leasehold interest in Queen's Beach; while Kaiser has a right of access for specific purposes, Kaiser has no possessory interest in Queen's Beach; and Kaiser has no lien on Queen's Beach. Kaiser merely holds the contractual right, not the obligation, to develop Hawaii Kai, including Queen's Beach, and only if it secures the necessary approvals from Bishop and the City, and if it wishes to undertake the risk and expense of such development.

C. Land Use Plans Applicable To Queen's Beach

As required by the 1959 Charter of the City and County of Honolulu, a General Plan for Oahu was enacted by ordinance effective May 7, 1964 ("1964 General Plan"). Immediately thereafter, a Detailed Land Use Map for the Hawaii Kai area was enacted, which was later amended ("1966 DLUM"). The 1966 DLUM showed potential land uses for Hawaii Kai. It designated approximately 100 acres of Queen's

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[13] If, in fact or law, *Bishop* is precluded from directly developing its own property as a condition of maintaining its tax status, *see* Kaiser's Petition, pp. 4, 5, that claim was not presented in any form to the district court during its consideration of the City's motion for summary judgment, or to the court of appeals. Accordingly, it should have no bearing on this Court's consideration of whether the district court erred in granting summary judgment against Kaiser. *See Commissioner v. McCoy*, 484 U.S. 3, 6, *reh'g denied*, 484 U.S. 982 (1987); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Moreover, one is hard-pressed to understand why that claim, even if it has any merit, would be relevant, even fleetingly, to the issues presented by Kaiser.

[14] The designation was not "to subdivide, develop, improve *and use*," as Kaiser claims in its petition. *See* Kaiser's Petition, p. 3 (emphasis added).

Beach for future resort use, five acres for future commercial use, and ninety-five acres for park and golf course use.

Effective January 2, 1973, the Revised Charter of the City and County of Honolulu ("1973 Charter"), as approved by the City's citizens, by a referendum vote held on November 7, 1972, became law, supplanting the 1959 Charter. On October 28, 1975, the City amended by ordinance the 1964 General Plan to clarify that DLUM's were not to be regarded as zoning maps, and were not to be considered as having priority over the provisions of the General Plan. *See Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization*, 63 Haw. 444, 630 P.2d 107 (1981).

On February 2, 1977, pursuant to the 1973 Charter, a General Plan for the City ("1977 General Plan") was adopted by resolution of the City Council.[15] That General Plan specifically identified Queen's Beach as a possible site for future resort development. On December 23, 1982, also pursuant to the 1973 Charter, the 1977 General Plan was amended ("1982 General Plan"). The 1982 General Plan differed from the 1977 General Plan in several respects, including the fact that Queen's Beach was not specified as a possible site of future resort development. Hence, until the passage of the 1982 General Plan, portions of Queen's Beach were planned for future resort use, but the zoning for all of Queen's Beach, while permitting residential use, did not permit resort use.[16]

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[15] The 1973 Charter provides that the General Plan contain:

> [T]he city's broad policies for the long range development of the city. It shall contain statements of the general social, economic, environmental and design objectives to be achieved for the general welfare and prosperity of the people of the city through government action, city, state or federal. The statements shall include but not be limited to, policy and development objectives to be achieved with respect to the distribution of social benefits, the most desirable uses of land within the city, the overall circulation pattern and the most desirable population densities within the several areas of the city.

[16] For a full discussion of zoning ordinances applicable to Queen's Beach *see infra* Statement of Facts, Section D.

As also required by the 1973 Charter, the City began in 1977 the process of formulating Development Plans for all areas of the City, including East Honolulu, which encompasses all of Hawaii Kai, including Queen's Beach.[17] In 1979, the City's Department of General Planning ("DPG") made public its proposed Development Plan Land Use Map for East Honolulu. This Development Plan Land Use Map proposed that a portion of lower Queen's Beach be designated for future resort uses and that the remainder of the property be designated for future preservation uses. In 1980, DGP proposed another Development Plan Land Use Map for East Honolulu containing the same designations for Queen's Beach ("1980 Proposed DP"). This proposed plan was submitted to the City Council, which, pursuant to the 1973 Charter, was required to enact Development Plans as ordinances. The 1980 Proposed DP was not adopted by City Council. Instead, the City Council passed a Development Plan Land Use Map for East Honolulu that was essentially consistent with a proposed land use plan submitted by Kaiser (without, incidentally, Bishop's approval) and that designated a portion of Queen's Beach for future resort uses and the remainder for future single-family residential uses. This Development Plan was vetoed by the Mayor (along with all but one of the seven other proposed Development Plans for the Island of Oahu passed by the City Council at the same time), for, among other reasons, its failure to adequately reflect the requirements of the 1977 General Plan.

In April, 1982, after reviewing input from both Bishop and Kaiser, DGP made public another proposed Development Plan Land Use Map for East Honolulu ("1982 Proposed DP"), which eliminated future resort uses at Queen's Beach. Instead, it proposed that approximately eighty acres of Queen's Beach be designated for future park uses and that the remaining area

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[17] Development Plans, as they were eventually formulated, are comprised of three elements: a written portion, which describes the area to which it is applicable as well as that area's long range goals, specific problems and planned future development; a land use map, which shows in pictorial form the future land uses for the area; and a public facilities map, which shows in pictorial form the area's existing public facilities and planned future public facilities.

of Queen's Beach be designated for future preservation uses. On May 10, 1983, the 1982 Proposed DP, with minor changes, was adopted as the Development Plan Land Use Map for East Honolulu. That map reflected the fact that the 1982 General Plan had *not* identified Queen's Beach as a future resort site.

D. Zoning Ordinances Applicable To Queen's Beach[18]

Applicable zoning has at all relevant times permitted development of Queen's Beach. Beginning in 1943, Queen's Beach was zoned to permit single-family residential uses. That zoning was in effect until March 1, 1984, when the zoning of Queen's Beach was amended to permit preservation uses.[19] Preservation zoning allows many possible uses, such as public and private golf courses, vacation cabins and uses that are accessory to those uses.[20]

E. Efforts To Develop Queen's Beach[21]

Prior to 1971, Kaiser and Bishop made no effort to gain the necessary approvals to develop Queen's Beach. On or

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[18] The City was not, as Kaiser suggests, *see* Kaiser's Petition, p. 7 n.11, required to zone Queen's Beach in conformance with the General Plan. *Nuuanu Neighborhood Ass'n v. Dep't of Land Utilization*, 63 Haw. 444, 630 P.2d 107 (1981).

[19] Kaiser has it backwards when it states that Queen's Beach was rezoned and then the planning designation was changed. *See* Kaiser's Petition, p. 9. In fact, the General Plan was changed first, then the Development Plan was adopted, and then Queen's Beach was rezoned, in the order prescribed by law.

[20] For a complete list of preservation uses *see* 649 F. Supp. at 929 n.4 (Appendix 4a-5a n.4).

[21] Kaiser is, perhaps, most disingenuous in its description of its efforts to develop Queen's Beach, even to the extent that it cannot maintain internal consistency. *Compare* Kaiser's Petition, p. 8 (eleven "applications") *with* p. 22 (seven "applications"). As the district court found, and the court of appeals agreed, 898 F.2d at 113 (Appendix 46a), Kaiser "made only two specific applications for zone change or development at Queen's Beach — one in 1971, which [it] did not follow through on, and one in 1983, which was denied following the adoption of the East Honolulu Development Plan.

(continued)

about February 8, 1971, they applied to the City for a zone change on sixteen parcels in Hawaii Kai, including a request that 42.4 acres of lower Queen's Beach be rezoned for resort and commercial uses. That application was met with substantial public opposition, including that of elected State legislators. The City deemed that application to be withdrawn by Kaiser as of July 10, 1971.[22]

No application has ever been submitted to the City to develop lower Queen's Beach in accordance with applicable zoning.[23] Only one application was ever submitted to the City to develop upper Queen's Beach, and that was submitted on March 18, 1983, in an obvious race of diligence with the proposed East Honolulu Development Plan, seeking approval to develop a single-family residential subdivision across approximately 120 acres of upper Queen's Beach. This one application was denied on May 19, 1983, after the May 10, 1983 enactment of the East Honolulu Development Plan had designated that portion of Queen's Beach for preservation uses.[24] Kaiser appealed the denial to the zoning board of appeals, which upheld the denial on March 8, 1984. Kaiser never appealed that denial to Hawaii's state courts.

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[21] (continued)
[Kaiser has] made no attempt to apply for development permits, zoning changes, or variances at Queen's Beach under its present zoning." 649 F. Supp. at 941-42 (Appendix 29a). For the effect of the latter failures on the ripeness of Kaiser's claims *see infra* Section II.A.

[22] By stating that neither of its applications "was granted by the City," *see* Kaiser's Petition, p. 8, Kaiser conveniently fails to mention that the 1971 application was deemed withdrawn.

[23] Lower Queen's Beach is the "makai," or "toward the ocean," portion of Queen's Beach comprised of roughly eighty acres.

[24] Kaiser's assertion that this application was denied because "the City adopted and implemented an extortionate official policy that prohibited any economically viable use of property in Hawaii Kai unless the ocean frontage of Queen's Beach was dedicated for free to the City for a public park," *see* Kaiser's Petition, p. 9, is groundless. The 1983 application was denied on specified grounds set forth in a written decision, none of which were in any way related to proposed dedication of property. Moreover, Kaiser did not see fit to challenge that decision in Hawaii's state courts.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE COURTS BELOW PROPERLY CONCLUDED THAT KAISER DOES NOT HAVE A PROPERTY INTEREST IN QUEEN'S BEACH THAT ENTITLES IT TO JUST COMPENSATION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

By affirming the district court's decision granting summary judgment against Kaiser "for the reasons stated by Judge King," 898 F.2d at 113 (Appendix 46a), the court of appeals affirmed the district court's finding that "Kaiser does not have a property interest in Queen's Beach." 649 F. Supp. at 949 (Appendix 43a). Although Kaiser disagrees with that finding and has petitioned for a writ of certiorari on that basis, the courts below have reached the right conclusion.

In order to allege a viable inverse condemnation claim under the Fifth Amendment, a plaintiff must have a compensable interest in the physical thing that has allegedly been taken. *United States v. Sec. Indus. Bank*, 459 U.S. 70, 75-76 (1982). Kaiser clearly does not have a compensable property interest in Queen's Beach. Kaiser merely has a contract—the Development Agreement—which has as its subject matter Hawaii Kai, of which Queen's Beach is a part, but which in no way gives Kaiser a compensable property interest in Queen's Beach. Even if all of the allegations contained in Kaiser's inverse condemnation claim, except those regarding alleged "property rights," are assumed to be true, the City has, as a matter of law, merely frustrated Kaiser's contract with Bishop.

In essence, Kaiser claims that the City, through inverse condemnation, has "taken" Queen's Beach itself, as opposed to the Development Agreement, and has thereby allegedly destroyed Kaiser's opportunity to exploit its bargain with Bishop. Such inverse condemnation claims must fail, as a matter of law, because they "confound the contract with its

subject-matter." *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923). *See also United States v. Grand River Dam Auth.*, 363 U.S. 229, *reh'g denied*, 364 U.S. 855 (1960); *Mullen Benevolent Corp. v. United States*, 290 U.S. 89 (1933); *PVM Redwood Co., Inc. v. United States*, 686 F.2d 1327 (9th Cir. 1982), *cert denied*, 459 U.S. 1106 (1983); *Windward Partners v. Ariyoshi*, 693 F.2d 928 (9th Cir. 1982), *cert. denied*, 461 U.S. 906 (1983); *Kearney & Trecker Corp. v. United States*, 688 F.2d 780 (Ct. Cl. 1982), *cert. denied*, 460 U.S. 1051 (1983); *T.O.F.C., Inc. v. United States*, 683 F.2d 389 (Ct. Cl. 1982); *Klein v. United States*, 375 F.2d 825 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 1037, *reh'g denied*, 390 U.S. 975 (1968); *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *Inv. Annuity, Inc. v. Blumenthal*, 609 F.2d 1 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 981 (1980); *United States v. 6.321 Acres of Land*, 479 F.2d 404 (1st Cir. 1973); *Hooten v. United States*, 405 F.2d 1167 (5th Cir. 1969) (*per curiam*); *Comptronics, Inc. v. Puerto Rico Tel. Co.*, 409 F. Supp. 800 (D.P.R. 1975), *aff'd*, 553 F.2d 701 (1st Cir. 1977); *United States. v. 180.37 Acres of Land*, 254 F. Supp. 209 (W.D. Va. 1966). This rule of law is well-established, widely-held, and clearly applicable to Kaiser's inverse condemnation claim.

Omnia Commercial Co. v. United States, 261 U.S. 502, 510 (1923), and its progeny, for example, *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960) and *Mullen Benevolent Corp. v. United States*, 290 U.S. 89 (1933), are dispositive of this issue.[25] In *Omnia*, the plaintiff ("Omnia") was a party to a contract with Allegheny Steel Company ("Allegheny"), by which it acquired the right to purchase a large amount of

[25] Kaiser's assertion that the court of appeals "ignored" *Omnia* and *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), is unavailing. *See supra* note 7 and accompanying text. Further, contrary to Kaiser's claim, the district court did not "erroneously distinguish *Monongahela*." *See* Kaiser's Petition, p. 16 n.24. The district court distinguished *Monongahela* for the same reason given by the *Omnia* Court. Namely, in *Monongahela*, the franchise was " 'not merely a contract in respect of the property taken, but was an integral part of it,' " and the government had taken the tangible property of the plaintiff. 649 F. Supp. at 935 n.8 (Appendix 17a n.8) (quoting *Omnia*, 261 U.S. at 513).

steel plate from Allegheny, at a bargain price. 261 U.S. at 507. The Court found that "[t]he contract was of great value and if carried out would have produced large profits [for Omnia]." *Id.* Shortly after Omnia entered into the contract, and before Allegheny had delivered any steel to Omnia, the federal government requisitioned Allegheny's entire production of steel plate for the following year, directed Allegheny not to comply with the terms of its contract with Omnia, and declared that if Allegheny attempted to deliver steel plate to Omnia the government would take over Allegheny's entire plant. *Id.*

Omnia sued the federal government, alleging that the government had taken the steel plate, which was Omnia's by right of contract, without payment of just compensation and, thus, in violation of the Fifth Amendment. *Id.* at 508. The Court concluded that Omnia's taking claim was without merit because Omnia did not have a compensable property interest in the steel plate, but rather only an interest in its contract with Allegheny. *Id.* at 510-11. The Court ruled that "[a]s a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended." *Id.* at 511.

Allegheny's steel plate is, by analogy, Bishop's Queen's Beach. Omnia and Kaiser both acquired certain contractual rights with respect to allegedly taken property by contracting with the property's owner. Omnia claimed to have lost a large amount of money because the steel plates were requisitioned. Similarly, Kaiser alleges a significant monetary loss as a result of the alleged taking of Queen's Beach. Yet, *Omnia* is clear: Omnia's right to derive financial gain from the allegedly taken property, which was the subject matter of its contract with the property's owner, did not itself constitute "property" within the meaning of the Fifth Amendment. *Id.* at 510-11. Omnia merely owned a contract right. Similarly, Kaiser owns nothing more than the contractual right to derive financial gain through the development of the allegedly taken property. At worst, the City has, for now, rendered the

further performance of Kaiser's Development Agreement impossible as to one small portion of Hawaii Kai.[26]

The Ninth Circuit followed *Omnia* and *Grand River Dam Auth.* in *PVM Redwood Co., Inc. v. United States*, 686 F.2d 1327 (9th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983). In that case, the PVM Redwood Co. ("PVM"), a sawmill operator, sued the federal government, alleging that the passage of the Redwood Park Expansion Act caused a taking of its property without payment of just compensation in violation of the Fifth Amendment. 686 F.2d at 1328. PVM alleged that it had entered into a contract with Louisiana-Pacific Corporation ("Lousiana-Pacific") and Simpson Timber Company ("Simpson"), whereby Louisiana-Pacific and Simpson agreed to supply PVM with raw materials that, according to PVM, amounted to ninety-eight percent of PVM's need for raw materials. *Id.* The federal government subsequently condemned Louisiana-Pacific's and Simpson's lands for national park expansion and Louisiana-Pacific and Simpson were, consequently, unable to furnish PVM with raw materials. *Id.* As a result of the taking, PVM alleged that it suffered an increase in production costs because it now had to work with an inferior grade of lumber and it had to retool and purchase new machinery to handle the inferior lumber. *Id.*

The district court dismissed PVM's inverse condemnation action for failure to state a claim upon which relief could be granted because "no property right held by PVM had been taken by the Government." *Id.* On appeal, the Ninth Circuit began its analysis by stating that:

> "PVM has failed to distinguish between 'appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power.' "

Id. at 1329 (quoting *Grand River Dam Auth.*, 363 U.S. at 236). The Ninth Circuit affirmed the district court's dismissal, holding that PVM had no compensable property interest in the

[26] In fact, unlike Omnia, Kaiser retains its contract right to derive financial gain from the subject matter of its contract. It can, and has, developed other portions of Hawaii Kai since the alleged "taking" by the City.

lands taken by the federal government. 686 F.2d at 1329. The Ninth Circuit found that PVM had lost only " 'a prospective business opportunity.' " *Id.* (quoting *Grand River Dam Auth.*, 363 U.S. at 236).

Similarly, that is all Kaiser has lost, assuming for purposes of this argument that its allegations concerning the effect of the City's regulations are true. It has lost an opportunity to make a financial gain by developing a portion of someone else's property.

Of course, a lost opportunity may also translate into the loss of funds already invested in anticipation of capitalizing on that opportunity. This was the situation, allegedly, in *PVM Redwood.* PVM claimed to have invested in machinery and equipment in anticipation of a longer relationship with its suppliers, Louisiana-Pacific and Simpson. 686 F.2d at 1328. When the government effectively brought those relationships to an end, PVM's investment in those relationships was, to some degree, lost. For the purposes of the Ninth Circuit's analysis, PVM's lost investment was of no significance, *id.* at 1329; PVM could not convert its mere contract rights in the taken property to a constitutionally-protected property right in the taken property by investing money in reliance upon the contract. Rather, as the controlling case law clearly holds, it is only the character of the claimant's interest in the subject property that creates a protectable property interest under the Fifth Amendment, not the nature or extent of the investment in the claimant's interest.

Kaiser alleges that it has invested significant funds in preparing Queen's Beach for development. *See* Kaiser's Petition, pp. 6, 7. That investment represents a business risk taken by Kaiser.[27] The plaintiffs in *PVM Redwood* and in many

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[27] The district court's finding on this point could not be clearer. The district court found, and the court of appeals agreed, 898 F.2d at 113 (Appendix 46a), that:

> Even assuming that costs Kaiser has invested in infrastructure elsewhere in Hawaii Kai can be properly allocated to the anticipated development, this investment represents a business risk undertaken by Kaiser. Kaiser cannot turn a contract right into
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> *(continued)*

other cases following *Omnia* also invested significant amounts of money in anticipation of exploiting the full extent of their bargain with the property owners. However, the law is clear: a contracting party cannot convert a contract right into a compensable property right by investing money in the subject matter of the contract in reliance upon the contract. *See, e.g., United States v. Grand River Dam Auth.*, 363 U.S. 229, *reh'g denied*, 364 U.S. 855 (1960); *Mullen Benevolent Corp. v. United States*, 290 U.S. 89 (1933); *PVM Redwood Co., Inc. v. United States*, 686 F.2d 1327 (9th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983); *United States v. 677.50 Acres of Land*, 420 F.2d 1136 (10th Cir.), *cert. denied*, 398 U.S. 928 (1970); *T.O.F.C., Inc. v. United States*, 686 F.2d 389 (Ct. Cl. 1982); *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 409 F. Supp. 800 (D.P.R. 1975), *aff'd*, 553 F.2d 701 (1st Cir. 1977).

The holding in *United States v. 677.50 Acres of Land* is a prime example of the application of this well-established rule of law. In that case, the plaintiff ("Clear Creek") was a pipeline company formed to transport oil from land leased by oil producers to gathering stations, in order to provide a market for the oil producers on those lands. 420 F.2d at 1137. Clear Creek laid the pipelines from the leased lands to the gathering stations and entered into division order contracts with all operators, working interest owners and royalty owners served by the pipelines. *Id.* Each contract included a provision that the contract would be irrevocable until 4.5 million barrels of oil ran through the pipelines. *Id.* That particular clause was incorporated to insure repayment of Clear Creek's investment in the pipeline. *Id.*

The federal government appropriated the leased lands after approximately seventy-three percent of the 4.5 million barrel quota had been met, thereby making it impossible for Clear Creek to recover its investment in the pipeline. *Id.* Clear

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[27] (continued)

> a property right simply by investing in the subject matter of the contract.

649 F. Supp. at 933 (Appendix 12a) (citing *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247, 1275-76 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)).

Creek sued the government alleging that its property had been taken for public use without payment of just compensation in violation of the Fifth Amendment. The court held that Clear Creek did not have a compensable property interest in the condemned lands. *Id.* Relying upon the Supreme Court's decision in *Omnia*, the court reasoned that Clear Creek had "confuse[d] the contracts with their subject matter," and in actuality merely possessed a contractual right with respect to the taken property, which was frustrated by the government's action. *Id.* The court specifically found that the claimant's underlying investment and the irrevocability clauses in the division order contracts did not elevate the stature of Clear Creek's contract rights to that of an interest or estate in the condemned lands. *Id.*

Hooten v. United States, 405 F.2d 1167 (5th Cir. 1969) *(per curiam)*, is another instructive case. In *Hooten*, the plaintiff ("Hooten") owned a real estate agency that had management contracts with the owners of four tenement properties on a certain tract of land. *Id.* at 1168. These contracts required Hooten's agency to perform certain tasks in exchange for a portion of the collected rents. *Id.* The federal government condemned these properties, and Hooten sued under the Fifth Amendment alleging that his interest in the properties, acquired through the management contracts, was taken without just compensation. The court concluded, after citing *Omnia* and other Supreme Court precedent, that:

> The mandate of the Supreme Court is clear and, accordingly, we hold that Hooten is not entitled to compensation for the contracts lost as a result of the takings in fee.

Id. at 1169. Like Kaiser, Hooten was one step removed from the subject real property, possessing only a contractual right to derive revenues from exploitation of the subject property. The court of appeals held that Hooten did not possess a compensable right in the underlying real property. Accordingly, Kaiser does not have a compensable right in the underlying real property at issue, Queen's Beach.

A. Kaiser's Characterizations Of Its Rights Under The Development Agreement Are, At Best, Unsupported; And, At Worst, Misstatements Of The Agreement's Unambiguous Terms.

Kaiser's petition exaggerates and mischaracterizes Kaiser's interest in Queen's Beach in an obvious attempt to bring whatever interest it has within the protection of the Fifth Amendment.[28]

First, Kaiser contends in at least one instance that it has "possession" of Queen's Beach. *See* Kaiser's Petition, p. 14. Kaiser does not possess Queen's Beach. Bishop owns Queen's Beach and remains the landowner and lessor of Kaiser's completed developments. What Kaiser has in actuality is a right of access for a specific purpose—to develop improvements thereon. To label such a contractual right of access a possessory interest is an untenable leap.[29]

Kaiser also contends that it has the right to lease developed lots or to sell that right to lease. *See* Kaiser's Petition, p. 6. Contrary to Kaiser's contention, Kaiser has the contractual right to designate certain numbers of lessees to whom Bishop *may* lease, but not the right to convey an interest in Queen's Beach by lease. Bishop executes all leases. Of course, Kaiser may sell its right to develop, together with its contractual benefit of being able to designate certain numbers of lessees. It is not, however, in any position to sell any right to lease, because it does not hold that right.

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[28] To the extent that Kaiser is worried about being "remediless," *see* Kaiser's Petition, p. 16, Kaiser's remedy for breach of its contractual rights, including its contractual right to reimbursement for its out-of-pocket losses, is, of course, a suit against Bishop for breach of the Development Agreement. *See, e.g., Hawaii Housing Auth. v. Lyman*, 68 Haw. 55, 77-78, 704 P.2d 888 (1985).

[29] Kaiser also states that "Queen's Beach was selected early on by Kaiser for resort development." *See* Kaiser's Petition, p. 3. Under the Development Agreement, Kaiser has the right to "select" tracts of land for development. Tract selection simply gives Kaiser the ability to proceed to subsequent planning steps in the development process. It gives Kaiser no interest in the land.

Kaiser goes out even further on its already imaginary limb by claiming that it has a right to sell leasehold estates. *See* Kaiser's Petition, p. 6. Kaiser has no right to dispose of the property. At best, Kaiser may, with Bishop's consent, assign or sublet lots that it has leased from Bishop.

In its petition, Kaiser also claims, for the very first time,[30] that it has a right to "use" Queen's Beach. This Court, for purposes of determining whether summary judgment was properly granted, should not consider arguments not made before the courts below. *See Commissioner v. McCoy,* 484 U.S. 3, 6, *reh'g denied,* 484 U.S. 982 (1987); *Singleton v. Wulff,* 428 U.S. 106, 120 (1976). In any event, Kaiser's new claim is without merit. As the cases cited by Kaiser make clear, *see* Kaiser's Petition, p. 12 n.18 (citing *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834 (1987) ("[P]roperty owners have the right to use property. . . ."), a right to use property derived from property ownership is undoubtedly a protected property right. Kaiser does not, however, have the right to use Queen's Beach. To begin with, Kaiser does not own Queen's Beach. Nor can Kaiser do any of the things associated with a right to use. For example, Kaiser cannot dispose of the property, by sale or by lease, and Kaiser has neither possession of nor unlimited access to Queen's Beach. Kaiser cannot even develop Queen's Beach in the manner it sees fit. Rather, Bishop controls that decision.

In short, the Development Agreement does not give Kaiser a right to "use" Queen's Beach. Rather, as Kaiser correctly points out at other places in its petition, *see, e.g.,* Kaiser's Petition, p. 18, the Development Agreement merely affords Kaiser the business opportunity to develop the land in Hawaii Kai, or, in the words of the district court, "Kaiser has the right, but not the obligation, to develop property in

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[30] At the district court level, Kaiser asserted "the exclusive right to develop the property, possession of the property, and the right to dispose of the property." 649 F. Supp. at 932 (Appendix 10a).

Hawaii Kai at its own expense and risk." 649 F. Supp. at 933 (Appendix 12a).[31]

The very terms of the Development Agreement explicitly state that Kaiser is to have no interest in Hawaii Kai, other than that of a lessee when it leases land from Bishop. In describing the relationship between Bishop[32] and Kaiser, the Agreement states:

> This Agreement shall not be construed as creating the relationship of principal and agent between

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[31] The mere right to develop is not a protected property right, and the district court went on to hold, and the court of appeals agreed, 898 F.2d at 113 (Appendix 46a), that "the development agreement itself, decisions by the Hawaii Supreme Court, and federal law all support the City's argument that Kaiser has no protectable property interest." 649 F. Supp. at 932 (Appendix 10a).

Kaiser's suggestion that this issue properly belongs in state court is incredible. *See* Kaiser's Petition, p. 14 n.21. As the district court explained, "[i]n determining whether Kaiser has a property interest that is entitled to protection under the federal constitution, *federal courts are not bound by state law.* However, federal courts look to state law for aid in determining the scope of property interests (citations omitted)." 649 F. Supp. at 932 (Appendix 10a) (emphasis added). Of the pertinent state law in this case, the district court noted that "the Hawaii Supreme Court has consistently refused to recognize Kaiser's asserted property interest, and the state court's interpretation is entitled to considerable deference in this matter." *Id.* at 934 (Appendix 14a).

Kaiser's attempt to distinguish the district court's reading of Hawaii cases, which themselves interpret Kaiser's interest in Hawaii Kai, is untenable. *See* Kaiser's Petition, p. 14 n.22. Kaiser attempts to distinguish those cases by stating that they all dealt with Kaiser's interest in land already developed by Kaiser. That distinction is really meaningless, especially since, according to Kaiser's own analysis in the case at bar, Kaiser acquires more rights in Hawaii Kai property as development progresses under the Development Agreement.

In short, Kaiser chose its forum, and, even though things have not turned out the way that Kaiser planned, Kaiser must now live with that choice.

[32] In at least two instances, Kaiser states that had Bishop not "assigned" certain rights to Kaiser, there is no doubt that Bishop would be able to pursue claims for a taking of property. *See* Kaiser's Petition, pp. 15-17. Therefore, the argument goes, having been assigned those rights, Kaiser should be able to pursue such claims. Kaiser misses the point here. Even after the "assignment" of rights to Kaiser, Bishop remains able to pursue claims for a taking of property because Bishop has retained the essential property rights.

> BISHOP and [KAISER], nor as creating a partnership, joint venture, or association of any kind between BISHOP and [KAISER], it being the purpose and intent hereof to create only a contractual relationship between BISHOP as a landowner and [KAISER] as an independent contractor to subdivide, develop and improve [Hawaii Kai]. It is contemplated that BISHOP as landowner will issue leases as lessor to the public, and to the extent that [KAISER] takes leases under and pursuant hereto, there shall be the relationship of lessor on the part of BISHOP and of lessee on the part of [KAISER], but not otherwise.

Therefore, Kaiser has no interest in property that it has not leased. Queen's Beach has never been leased to Kaiser, and, therefore, Kaiser has no interest in it.[33]

II. THE COURTS BELOW PROPERLY CONCLUDED THAT CERTAIN OF KAISER'S CLAIMS ARE NOT RIPE FOR FEDERAL ADJUDICATION.

In affirming the district court's decision granting summary judgment against Kaiser, the court of appeals stated: "The decision of the district court is affirmed for the reasons stated by Judge King in *Kaiser Development Co. v. Honolulu*, 649 F. Supp. 926 (D. Haw. 1986) [Appendix 1a-44a]." 898 F.2d at 113 (Appendix 46a). By affirming the district court's decision granting summary judgment against Kaiser "for the reasons stated by Judge King," *id.* (Appendix 46a), the court of

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[33] Kaiser's reliance upon state statutes in support of its so-called property rights is misplaced. *Hawaii Housing Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 888 (1925), completely undermines Kaiser's argument that the Hawaii Land Reform Act, Haw. Rev. Stat. § 516-1, converts its contract rights into protected property rights. *See* Kaiser's Petition, p. 15.

Kaiser's argument that the Hawaii Development Agreement Statute, Haw. Rev. Stat. § 46-123, recognizes a developer's property rights by allowing developers to enter into agreements with the City and "vest" their right to develop property is of no consequence to this case since Kaiser has no vested rights to development at Queen's Beach. 649 F. Supp. at 937-38 (Appendix 21a-22a). Vested rights, incidentally, are why the City did not object to Kaiser's presence in *Sandy Beach Defense Fund, et al. v. City Council of the City and County of Honolulu*, 70 Haw. 361, 773 P.2d 250 (1989). *See* Kaiser's Petition, p. 18 n.26. In that case, Kaiser had vested rights to the development at issue.

appeals affirmed the district court's dismissal of certain of Kaiser's claims based upon the finding that "[Kaiser's] claims are not ripe for review under *Williamson County [Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)]." 649 F. Supp. at 949 (Appendix 43a). Despite Kaiser's complaint that the ripeness doctrine is "in a state of conflict and confusion,"[34] *see* Kaiser's Petition, p. 20, the court of appeals and the district court properly found that certain of Kaiser's claims are not ripe for federal court review.

A. Kaiser Has Never Secured A Final Decision From The City Applying Preservation Zoning To Queen's Beach Nor Has Kaiser Ever Sought A Variance From Preservation Zoning.

Far from being "in a state of conflict and confusion," the standard for when a regulatory taking claim or a substantive due process claim premised upon an allegation that all use has been denied is ripe for adjudication by a federal court is well-settled. Two conditions must be satisfied. First, such claims are not ripe until the landowner has received:

> "[A] final and authoritative determination of the type and intensity of development legally permitted on the subject property."

Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1453, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988)

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[34] The district court did not, as Kaiser suggests, *see* Kaiser's Petition, p. 21, ask for "clarification" of the ripeness doctrine. To the contrary, in applying the ripeness doctrine to Kaiser's claims and in concluding that those claims are not ripe, the district court explained that it was following the wisdom of Lord Denning who wrote:

> "Seek to make your opinions clear at all costs. Make them positive and definite. Not neutral or vacillating. My pupil master told me early on of the client's complaint: 'I want your opinion and not your doubts,' and of Sir George Jessel's characteristic saying: 'I may be wrong and sometimes am, but I am never in doubt.' "

649 F. Supp. at 941 n.18 (Appendix 28a) (quoting Lord Denning, *Lord Denning on the Discipline of Law* 7 (1979)).

Similarly flawed is Kaiser's complaint that the court of appeals gave no clarification of the ripeness doctrine. *See* Kaiser's Petition, p. 21. The court of appeals endorsed the district court's application of the ripeness doctrine to Kaiser's claims and the district court's conclusion that Kaiser's claims are not ripe. 898 F.2d at 113 (Appendix 46a).

(quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)). *Accord Williamson County Regional Planning Comm'n*, 473 U.S. at 180, 190 n.11; *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1987); *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, *amended*, 841 F.2d 872, 876 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988); *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir.), *cert. denied*, 488 U.S. 994 (1988); *Austin v. City and County of Honolulu*, 840 F.2d 678, 680 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 377 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988); *Herrington v. Sonoma County*, 834 F.2d 1488, 1499 (9th Cir. 1987), *modified*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).[35] As this Court has explained: "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates*, 477 U.S. at 348. In other words, " 'the nature and extent of permitted development' " must be "expose[d]" by virtue of the municipality's final decision. *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates*, 477 U.S. at 348).

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[35] Without the benefit of elaboration, Kaiser argues that *Lake Nacimiento Ranch Co.* and *Herrington* are "utterly irreconcilable." *See* Kaiser's Petition, p. 21. Kaiser's argument is, however, unavailing. To begin with, the courts in both cases applied the so-called "final decision requirement." To the extent that the perceived conflict is that the second requirement of the ripeness doctrine was not applied in *Herrington*, the court there explained that it was not applying the requirement that the plaintiff prove that state procedures for obtaining just compensation are inadequate because no Fifth Amendment takings claims were being raised therein. 834 F.2d at 1499 n.10. Moreover, to the extent that the perceived conflict is that the courts reached different holdings regarding the ripeness of the claims before them, the explanation given by another court of its holding on the ripeness issue is most instructive:

> We emphasize that our decision here turns on the specific facts presented in this case . . . As in many types of litigation, resolution of this issue turns on the record facts. Relevant cases in the Supreme Court and this court are extremely fact-specific.

Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989).

As Kaiser points out, *see* Kaiser's Petition, p. 22 n.30, the court of appeals, in affirming the district court's dismissal of certain of Kaiser's claims on ripeness grounds, considered both *Lake Nacimiento Ranch Co.* and *Herrington*, and the court of appeals found no conflict. Further, this Court, in denying certiorari to both cases, apparently found no conflict either.

The district court found, and the court of appeals agreed, 898 F.2d at 113 (Appendix 46a), that the Petitioners "have not submitted a development plan under the present land use regulations, which list at least twenty possible uses for the land. . . . " 649 F. Supp. at 940 (Appendix 26a-27a).[36] Kaiser has, therefore, failed to obtain a final and authoritative determination of " 'the nature and extent of permitted development' " at Queen's Beach. *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates*, 477 U.S. at 348). By failing to expose the extent of permitted development, Kaiser has failed to satisfy the so-called "final decision requirement." *Herrington*, 834 F.2d at 1496.

Kaiser's shortcomings do not end there. The final decision requirement also requires a plaintiff to show that it has applied for and been denied a variance from the regulations at issue. *Lake Nacimiento Ranch Co.*, 841 F.2d at 876 (citing *Williamson County Regional Planning Comm'n*, 473 U.S. at 187-88; *Kinzli*, 818 F.2d at 1454). *Accord Lai*, 841 F.2d at 303; *Austin*, 840 F.2d at 680; *Shelter Creek Dev. Corp.*, 838 F.2d at 377. The district court found, 649 F. Supp. at 942 (Appendix 29a), and the court of appeals again agreed, 898 F.2d at 113 (Appendix 46a), that Kaiser has never sought a variance from the regulations at issue, although Kaiser has, despite its apparent claim to the contrary, *see* Kaiser's Petition, p. 23, been able to apply for such a variance pursuant to § 6-1009 of the 1973 Charter. As this Court stated in *Williamson County Regional Planning Comm'n:* "[I]t is impossible to determine the extent of the loss or interference until the [municipality] has decided whether it will grant a variance from the application of its regulations." 473 U.S. at 192 n.12.

Having failed to submit a development plan under the present land use regulations and having failed to apply for a variance from those regulations, Kaiser has absolutely failed to meet the final decision requirement.[37] Therefore, its taking claims are not ripe for adjudication by a federal court.

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[36] Kaiser's fears about "the risks facing a developer wishing to undertake a new town development," *see* Kaiser's Petition, p. 7 n.10, could have been alleviated by submitting a development plan for approval.

[37] Kaiser states that it "had no reason to suspect . . . anything but extensive development at Queen's Beach . . . ." *See* Kaiser's Petition, p. 7. To the

(continued)

B. The Futility Exception Does Not Excuse Kaiser From Meeting The Final Decision Requirement.

Kaiser does not claim that it satisfied the final decision requirement. Rather, Kaiser seeks to avoid the requirement by claiming futility. The so-called "futility exception" to the final decision requirement holds that the requirement may be avoided if the plaintiff can show that an attempt to comply with the requirement would be an " 'idle and futile act.' " *Kinzli*, 818 F.2d at 1454 (quoting *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n.2 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983)). The plaintiff has the " 'heavy burden' " of showing futility. *Lake Nacimiento Ranch Co.*, 841 F.2d at 876 (quoting *Am. Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981)).

Kaiser cannot meet this heavy burden for the same reason that it cannot satisfy the final decision requirement. Kaiser has never made *any* application, let alone a meaningful one, pursuant to the regulations at issue, nor has it made a meaningful application for a variance from those regulations.[38] A plaintiff cannot rely on the futility exception until *at least* one "meaningful application" has been made to expose the type and intensity of development legally permitted on the subject property and *at least* one "meaningful application" has been made for a variance from the regulations at issue. *Lake Nacimiento Ranch Co.*, 841 F.2d at 876-77; *Herrington*, 834 F.2d at 1495-96; *Kinzli*, 818 F.2d at 1454-55.[39]

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[37] (continued)
extent that Kaiser's suspicions were based upon planning designations and zoning ordinances, the district court, 649 F. Supp. at 937 (Appendix 21a), and the court of appeals, 898 F.2d at 113 (Appendix 46a), found that those suspicions were baseless. Of course, Kaiser could have moved beyond dealing in mere suspicions by submitting a development plan and/or applying for a variance.

[38] In this regard, Kaiser's statement that "*[f]urther* applications for development" under the regulations at issue "would be meaningless," *see* Kaiser's Petition, p. 25 (emphasis added), misrepresents the evidence.

[39] The one "meaningful application" requirement should alleviate Kaiser's concerns that "the government may say, ad infinitum: No, we will not permit this use, but that does not preclude us allowing some other use of the property." *See* Kaiser's Petition, p. 26 n.36.

In claiming futility, Kaiser states that "the City admitted that there was a significant factual dispute over the permitted viable uses of Queen's Beach."[40] *See* Kaiser's Petition, p. 23. Kaiser, in turn, argues that one cannot make a "meaningful" application to develop when none of the permitted uses would be economically viable. The problem with Kaiser's "logic" is that, given Kaiser's failure to satisfy the final decision requirement,[41] permitted uses of Queen's Beach are unknown.[42] Kaiser cannot argue futility based upon an unknown.[43]

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[40] Kaiser questions how the district court could grant summary judgment in light of a conceded factual dispute, *see* Kaiser's Petition, p. 22, but the district court's explanation should suffice. In reaching its decision that Kaiser had failed to satisfy the ripeness doctrine, the district court stated that:

> The City readily admits that there is a significant factual dispute concerning the economic value of Queen's Beach under the present zoning. I believe I do not have to assess the economic viability of particular uses in this case. For the purpose of my determination that the takings issue is unripe, I believe that it is sufficient that the present zoning allows many potential uses and that plaintiffs have not submitted *any* application, let alone a "meaningful" one, to develop Queen's Beach consistent with its zoning.

649 F. Supp. at 942 n.21 (Appendix 30a) (emphasis in original).

Kaiser, in attempting to make its futility argument, even goes so far as to misquote the district court's decision by substituting "viability" for "value." *See* Kaiser's Petition, p. 22.

[41] The district court should not, in light of Kaiser's failure to satisfy the final decision requirement, have "taken as true Kaiser's assertion that no viable uses were permitted. . . ." *See* Kaiser's Petition, p. 25 n.35.

[42] At one point, Kaiser states that "[e]ven the maximum use the City claims it would allow under the new regulation — a golf course with vacation cabins — is not economically viable." See Kaiser's Petition, p. 23. Apart from the fact that, because of Kaiser's failure to satisfy the final decision requirement, it is unknown what uses would be allowed at Queen's Beach, this statement warrants comment. The testimony at trial was that a private golf course would be economically viable, leading both courts below to conclude that Bishop had failed to offer any substantial evidence that it had no economically viable use for its property. *See* Appendix 52a and 913 F.2d at 576 (Appendix 59a).

[43] Without the benefit of citation to any authority, Kaiser also argues that "[w]hen the permitted uses under new zoning are not economically

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Kaiser has never applied for permission to develop under the challenged regulations or for a variance from the challenged regulations.[44] Therefore, the "futility exception" is not available to Kaiser.[45] That heavy burden has not been met. "[M]ere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility." *Herrington*, 834 F.2d at 1496 (citing *Williamson County Regional Planning Comm'n*, 473 U.S. at 188; *Kaiser Dev. Co.*, 649 F. Supp. at 942). With statements such as, "it is clear that no application for development would be approved," *see* Kaiser's Petition, p. 25 n.35, Kaiser merely alleges futility.

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[43] (continued)
viable, a meaningful application is one in conformity with planning and zoning prior to the challenged unlawful conduct." *See* Kaiser's Petition, p. 25. This novel approach to the meaningful application requirement is flawed for the same reason. Permitted uses are unknown given Kaiser's failure to satisfy the final decision requirement.

[44] Kaiser also claims that "[t]his Court has recognized that an owner need only apply for development consistent with reasonable investment-backed expectations. . . ." *See* Kaiser's Petition, p. 24. However, neither of the authorities cited by Kaiser for this proposition is actually supportive. In *Agins v. City of Tiburon*, this Court, in finding appellants' claims not ripe for review, stated that "[a]t this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials." 477 U.S. 255, 262 (1980). The statement that the appellants in *Agins*, like Kaiser here, are free to pursue their reasonable investment expectations is hardly synonymous with the claim that they need *only* pursue such expectations.

Williamson County is even less supportive of Kaiser's claim. There, this Court noted that investment-backed expectations do not come into play until after the landowner has filed a development application. Specifically, this Court found that interference with investment-backed expectations "cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191.

[45] At one point, Kaiser complains that its plans for a large hotel complex at Queen's Beach "are not possible" under current regulations. *See* Kaiser's Petition, p. 23. "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, Sommer & Frates*, 477 U.S. at 353 n.9.

C. Kaiser Has Failed To Demonstrate That There Is No Adequate State Procedure For Securing Just Compensation.

The second condition that must be satisfied before a regulatory taking claim or a substantive due process claim premised upon an allegation that all use has been denied is ripe for adjudication by a federal court is that the landowner must prove that state procedures for obtaining just compensation are inadequate. *See Williamson County Regional Planning Comm'n*, 473 U.S. at 196-97; *Hoehne*, 870 F.2d at 534; *Lake Nacimiento Ranch Co.*, 841 F.2d at 879-80; *Austin*, 840 F.2d at 680; *Kinzli*, 818 F.2d at 1455.[46]

The courts below did not, as Kaiser suggests, *see* Kaiser's Petition, p. 26, "ignore" *Williamson County Regional Planning Comm'n*. Rather, the courts below premised their findings upon *Williamson County*. Specifically, the district court found, 649 F. Supp. at 942 (Appendix 30a), and the court of appeals agreed, 898 F.2d at 113 (Appendix 46a), that "Kaiser has not met the second prong of the *Williamson County* finality doctrine. That is, Kaiser has not tried to use state procedures to obtain just compensation or shown that such procedures are unavailable or inadequate."[47]

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[46] Despite Kaiser's grumblings about "the burden on the property owner," *see* Kaiser's Petition, p. 26, the burden is upon the plaintiff to show "that the inverse condemnation procedure is unavailable or inadequate. . . ." *Williamson County Regional Planning Comm'n*, 473 U.S. at 197.

[47] Kaiser contends that there is a conflict regarding when courts have required use of state procedures. *See* Kaiser's Petition, p. 27 n.37. No such conflict exists. In all of the cases cited by Kaiser, the courts followed the general rule that until the state court has ruled that an inverse condemnation action could not be brought or has denied the plaintiff compensation, the plaintiff's claims are not ripe. The fact that in some of the cases cited by Kaiser the courts concluded that the state courts had not ruled that an inverse condemnation action could not be brought, *see Himelstein v. City of Ft. Wayne*, 898 F.2d 573, 576 (7th Cir. 1990); *Culebras Ent. Corp. v. Rivera Rios*, 813 F.2d 506, 514-15 (1st Cir. 1987); *Littlefield v. City of Afton*, 785 F.2d 596, 609 (9th Cir. 1986); *Lerman v. City of Portland*, 675 F. Supp. 11, 16 (D. Me. 1987), *aff'd*, 879 F.2d 852 (1st Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 243, *reh'g denied*, ____ U.S. ____, 110 S. Ct. 527 (1989); *Austin v. City and County of Honolulu*, 840 F.2d 678, 680-81 (9th Cir.), *cert.*

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Kaiser also suggests that the courts below "ignored clear Hawaii law" in finding that Kaiser had not satisfied the second requirement of the ripeness doctrine. *See* Kaiser's Petition, p. 26. Kaiser argues, citing *Allen v. City and County of Honolulu*, 58 Haw. 432, 571 P.2d 328 (1977), that Hawaii does not allow damages for inverse condemnation. *See* Kaiser's Petition, p. 27. The courts below did not "ignore" *Allen*. To the contrary, the district court distinguished *Allen* as follows:

> *Allen* concerned compensation for zoning estoppel and not regulatory takings. While *Allen* indicates that the state court might generally look on damages for development costs with disfavor, it does not necessarily preclude compensation for . . . Kaiser's claims.

649 F. Supp. at 942 (Appendix 30a-31a). The court of appeals concurred with the district court's treatment of *Allen*. 898 F.2d at 113 (Appendix 46a).

Kaiser also cites *City and County of Honolulu v. Chun*, 54 Haw. 287, 506 P.2d 770 (1973), and *Honolulu Memorial Park, Inc. v. City and County of Honolulu*, 50 Haw. 189, 436 P.2d 207 (1967), in support of its argument that Hawaii does not allow damages for inverse condemnation. *See* Kaiser's Petition, pp. 27-28. Kaiser did not refer to *Chun* before the district court and Kaiser has never before referred to *Honolulu Memorial Park*.[48] Therefore, these cases should be given little, if any, weight by this Court in determining whether Kaiser satisfied its burden below.

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[47] (continued)
denied, 488 U.S. 852 (1988), and in others the courts concluded that the state courts had ruled that an inverse condemnation action could not be brought, *see Hoehne v. County of San Benito*, 870 F.2d 529, 533-34 (9th Cir. 1989); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1519 (11th Cir. 1987), *aff'd*, 904 F.2d 585 (11th Cir. 1990); *Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1372 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1132 (1990) does not create a conflict.

[48] Since Kaiser did not argue either of these cases before the district court and only argued *Chun* before the court of appeals, Kaiser is less than forthright with this Court when it states that these cases must have been "misread" by the courts below. *See* Kaiser's Petition, p. 27.

In any event, these cases do not support the contention that state remedies for inverse condemnation are unavailable in Hawaii state courts. *Chun*, which Kaiser cites for the proposition that "Hawaii did not follow the rule that property owners are entitled to compensation for oppressive precondemnation activities under the Fifth Amendment," *see* Kaiser's Petition, p. 29 n.40, is a direct condemnation action. Rather than offering any insight into how the court would handle an action in inverse condemnation, *Chun* discusses when the value of the taking is to be established in a direct condemnation action. 54 Haw. at 288-289. *Chun* concludes that, in a direct condemnation action, the value of the condemned property is set at the date of the summons. *Id.* at 289. *Chun* does not foreclose a property owner from filing an inverse condemnation action for damages occurring prior to that date.

Kaiser's new-found reliance on *Honolulu Memorial Park* is even more misplaced. *Honolulu Memorial Park* is an action for ejectment. In explaining the nature of an action for ejectment, the court stated that "it does not in any way include condemnation of property," 50 Haw. at 194, and, therefore, "evidence [of damages] is immaterial. . . . " *Id.* Obviously, neither *Chun* nor *Honolulu Memorial Park* can fairly be said to support the contention that state remedies for inverse condemnation are unavailable in Hawaii state courts.[49]

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[49] Kaiser states that the City has conceded that there is no adequate damage remedy for inverse condemnation under Hawaii law. *See* Kaiser's Petition, p. 28 n.39. That statement requires elaboration. No such concession was made in this case. In *Lai*, the defendant City and County of Honolulu stipulated that there were no state procedures in Hawaii for recovering just compensation pursuant to inverse condemnation claims. It would appear that the stipulation executed by the parties in *Lai* was ill-advised. In *Austin*, where the defendant City and County of Honolulu did not enter into a stipulation regarding the availability of state remedies, the Ninth Circuit concluded that the plaintiff could seek compensation pursuant to the Hawaii Constitution and Haw. Rev. Stat. § 101-3. 840 F.2d at 681. The *Austin* court then held that the plaintiff's claim was not ripe because the plaintiff had failed to prove that relief under those state laws would be inadequate. *Id.* at 680-81.

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The courts below properly concluded that Kaiser had failed to prove that just compensation is not available under Hawaii law. Given that conclusion and the earlier conclusion that Kaiser had failed to meet the final decision requirement, Kaiser's takings claims are not ripe for federal adjudication.

CONCLUSION

For the foregoing reasons, the Respondent City and County of Honolulu respectfully urges this Court to deny the Petitioners' petition for a writ of certiorari.

Respectfully submitted,

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[49] (continued)

Kaiser also argues that the conflicting positions in *Lai* and *Austin* support its claim that state remedies are unavailable. In affirming the district court's dismissal of certain of Kaiser's claims on ripeness grounds, the court of appeals specifically considered *Lai* and found that it did not change the validity of the district court's decision. 898 F.2d at 113 (Appendix 46a). Further, this Court, in denying certiorari to both *Lai* and *Austin*, apparently perceived no conflict.